Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS	)))))	WT Docket No. 03-128

To: The Commission

COMMENTS OF AMERICAN TOWER CORPORATION

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SUMMARY

American Tower Corporation ("ATC") is a leading infrastructure provider for the wireless, Internet and broadcasting industries in the Untied States. As a tower builder, owner, manager, and landlord, ATC has worked extensively with Indian tribes, state and federal regulators, and industry in relation to the National Historic Preservation Act's Section 106 process. As a long-time and active participant in the Advisory Council's Telecommunications Working Group, ATC appreciates the Commission's efforts to streamline the Section 106 process in this proceeding and with the Draft NPA. Nevertheless, a significant number of outstanding issues with the programmatic agreement remain unresolved and further clarification and revision is necessary.

First, the Commission must impose and enforce strict and uniform timelines for review and comment for all parties involved in the Section 106 process. The Draft NPA includes a number of timeframes that, if enforced, will go a long way towards addressing deficiencies in the current process. Many of these provisions, however, must be strengthened and exceptions eliminated to better ensure that the consultation process will not be bogged down by unnecessary delay due to open-ended review periods, while also providing stakeholders ample time to perform their piece of the Section 106 process.

Second, the Commission must clarify in the Draft NPA that construction of a tower by a non-licensee does not constitute an undertaking subject to Section 106. If such an activity is an undertaking, the tower owner, not the carrier, should be primarily responsible for Section 106. In any event, the Commission must clearly identify which party – tower owner vs. wireless/broadcast/Internet tenant – has primary Section 106 responsibilities.

Third, the final NPA should clearly exempt from Section 106 review any class of undertakings that present little or no ability to cause adverse effects to historic properties. As important streamlining measures, exclusions, however, must be clear, concise and self-executing. Of those exclusions presented in the Draft NPA, the replacement tower and previously disturbed ground exclusions most closely meet these characteristic and are of the greatest importance to ATC. Further, modifications not involving collocations are not undertakings and therefore should not be listed as an exclusion.

Fourth, ATC recognizes that Indian tribes deserve the utmost respect from all parties involved in the Section 106 process. Nevertheless, with certain notable exceptions, tribes should not be granted greater rights or be forced to bear greater burdens than other consulting parties. The timeframes for tribal participation should be firm, and contain no exceptions.

Finally, the Commission should revise the Section 106 complaint procedures to address matters of timeliness of complaints, the required substantive burden, and reviewable issues. In sum, ATC urges the Commission to adopt these and the other reforms addressed in these comments, in order to assure a final programmatic agreement that realizes the fundamental goals of the NHPA and is fair, efficient, practical and truly streamlined.

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COMMENTS OF AMERICAN TOWER CORPORATION

Introduction

American Tower Corporation ("ATC") submits these comments in response to the Federal Communications Commission's Notice of Proposed Rulemaking ("NHPA NPRM") and draft Nationwide Programmatic Agreement ("Draft NPA") addressing the review of Federal Communication Commission ("FCC" or "Commission") undertakings pursuant to Section 106 of the National Historic Preservation Act ("NHPA").[1] In these comments, ATC proposes a series of guiding principles to be followed in finalizing the NPA and suggests changes specific to individual provisions in the Draft NPA.

ATC has been an active member of the Telecommunications Working Group ("TWG") since its inception in August 2000. Over that time, the TWG crafted much of the current proposed Draft NPA, and the Nationwide Programmatic Agreement for the

Collocation of Wireless Antennas ("NCPA") adopted in 2001. After its nearly three years of work with the TWG, and in light of its daily experience in implementing the current Section 106 procedures as the Commission's delegatee, ATC is acutely aware of the importance of rapidly developing a programmatic agreement that all parties with a stake in the Section 106 process can support.

ATC commends and supports the Commission for the streamlining initiatives contained in the Draft NPA. ATC is also aware, however, that many important and difficult legal and conceptual issues in the NPA have yet to be resolved, and considerable work remains to achieve agreement on the resolution of these issues. ATC believes that resolution of these key points will determine whether the NPA will be successfully implemented and embraced by the various participants in the Section 106 process.

ATC offers the following comments, concerns and suggestions, in the spirit of constructive cooperation that distinguished the efforts of the TWG, and with the firm belief that careful consideration and implementation of the comments discussed below will help achieve the goals for this NPRM outlined by Chairman Powell. ATC's comments and suggestions are intended to help promote both the rapid and efficient deployment of telecommunications infrastructure and the preservation of historic properties.

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[1] *See* Notice of Proposed Rulemaking, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, FCC 03-125 (rel. June 9, 2003) ("NHPA NPRM").

Background

ATC builds, owns, manages, develops and leases space on communications towers and is the leading infrastructure provider for the wireless, Internet and broadcasting industries in North America. ATC is a full-service solutions provider, offering a wide range of products and services ranging from RF engineering and fixed network design, site acquisition, zoning, and development, to management and leasing, and tower construction and equipment installation.

Through its work with the TWG, ATC has gained valuable insight into the theory and application of Section 106 from many different perspectives, including those of state and federal regulators, FCC licensees, Indian tribes and cultural resources consultants. In addition, through its vast experience as a designer, builder, and operator of infrastructure across the country, ATC has amassed tremendous practical experience with how the Section 106 compliance process actually works, both in the field and at the Commission.

ATC believes that its comments will provide the Commission with a unique approach to some key unresolved concerns, combining the best theoretical solutions, tempered with wisdom gained through practical experience. As a tower manager and landlord to virtually all wireless carriers and broadcast companies, ATC is particularly familiar with questions that, although not uncommon, are currently not answered in the Draft NPA. These include clarifying what qualifies as an "Undertaking"; clarifying responsibilities between Commission licensees and tower owners in order to minimize conflicts and duplication in Section 106 compliance; formalizing a workable complaint process; and narrowing certain Section 106 principles to conform to the original intent and scope of the NHPA.

ATC urges the Commission to recognize the breadth and depth of practical experience that informs the comments below, and revise those provisions of the Draft NPA in a manner that assures that the final NPA will realize the fundamental goals of the NHPA and will be fair, efficient, practical and truly streamlined.

Discussion

I. Guiding Principles and Key Issues

ATC believes that the following five principles should guide the Commission during the finalization of the programmatic agreement.

- Streamline the Process and Impose Strict And Uniform Time Limits
- Tower Construction and Registration By Non-Licensees Are Not Undertakings
- Adopt Clear And Objective Exclusions
- Adopt Reasonable Tribal Participation Procedures
- Implement Fair and Uniform Complaint Procedures

Several of these principles reflect concepts that guided the TWG during development of the Draft NPA; the others represent concepts governing key unresolved topics in the Draft NPA. The final NPA should further these principles and the Commission's policies of compliance and enforcement should incorporate them.

A. Streamline the Process and Impose Strict and Uniform Time Limits.

The NPA will be worthy of the effort only if it streamlines the existing Section 106 process as set forth in the ACHP's rules. The benchmark standards should be the current compliance burdens on all parties and the protection standards for historic properties in the

current ACHP rules. The final NPA should not impose additional burdens on state or federal regulators or additional compliance burdens on FCC regulatees. ATC generally supports the Draft NPA as achieving this streamlining goal. Nevertheless, certain proposals, mainly those proposed relating to tribal consultation, threaten to impose significant temporal and financial burdens on FCC delegatees. As explained further below, the Commission should reject these tribal proposals and adopt the original exclusion and tribal consultation proposals developed by the TWG.

Also critical to the real-world success of the NPA will be the imposition of reasonable and uniformly-applied time limits on the various components of the Section 106 process in order to avoid the current "regulatory muddle and delay" identified by Chairman Powell.[2] The time limits contained in the ACHP's existing rules are not uniformly adhered to by participants in the Section 106 process and are not enforced by the Commission.

The Draft NPA contains several excellent provisions that address these deficiencies. For example, ATC agrees with the proposal in Draft NPA Section VII, that if a SHPO fails to respond within the set timeframe to an Applicant's Submission Packet asserting that a proposed undertaking will have "no effect on [h]istoric [p]roperties," the Section 106 process will be deemed complete. ATC urges the Commission to extend this policy to Draft NPA Section VII.C.2 cases where applicants submit findings of "no adverse effect" to historic properties as well. The review period provided allows SHPOs ample time to effectively assess proposed undertakings and applicants should not be prejudiced by a SHPO's inability

[2] NHPA NPRM, Separate Statement of FCC Chairman Michael K. Powell.

to adhere to this reasonable time frame. At a minimum, if the Commission concludes it must process "no adverse effect" determinations where the SHPO has not acted, it should impose a 15-day limit on reviews of Submission Packets and specify the circumstances under which the Commission may request additional information from the applicant.

The Commission should enforce similarly strict time limits with respect to comments on Submission Packets by consulting parties and the public. Indeed, the SHPO review process would be particularly effective if the Commission adopted a time frame for comments and action that tracks its existing 30-day public notice process for assignment/transfer applications and environmental assessments.[3]

More specifically, the Commission should adopt the following procedure. Once an applicant submits a Submission Packet to a SHPO, all consulting parties and interested parties (including tribes and NHOs) should have thirty days in which to file comments with the applicant or SHPO. Obviously, this time constraint already is contained in the ACHP's rules, but is not adhered to.[4] At the end of the 30-day period, the SHPO should have a non-extendable five-day period to act on the Submission Packet.[5] Adhering to this timetable would eliminate the confusing proposal contained in Section VII.A.3. of the Draft NPA and bring certainty to a critical component of the Section 106 process. Of course, adopting this procedure would mean that SHPOs could not act on a Submission Packet prior to the end of

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[3] *See* 47 C.F.R. § 1.933.

[4] *See, e.g.*, 36 C.F.R. § 800.5(c)(2)(i).

the 30-day comment period.[6] But this minor restriction would ensure that all timely submitted comments are considered.

More focused time limits also are appropriate for issues concerning tribal consultation. Where an Indian tribe or NHO requests direct government-to-government consultation with the Commission, the NPA should set forth specific procedures for dealing with such requests. These procedures would include: strict timeframes to ensure prompt, open consultation and resolution with no unnecessary delay and a time frame and structure to resolve procedural disagreements.

The timing for achieving compliance with Sections IV.E. and F. of the Draft NPA also must be clarified, as the draft language is too open-ended. ATC suggests replacing the proposed 30-day initial tribal notice period with a 21-day period. Although this period is shorter than the current proposal, ATC believes it represents the timeframe within which an assessment of potential historic properties typically occurs in practice. If the tribe requests additional time to respond, the applicant should afford up to 10 additional days, as circumstances warrant.[7]

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[5] Applicants would not be required to forward to the SHPO – and the SHPO would not be permitted to consider – comments received after the expiration of the 30-day period or comments that did not deal substantially with potential adverse effects from the undertaking.

[6] Sections VII.B.3. and VII.C.3. of the Draft NPA provide that if a SHPO believes an Undertaking causes an "adverse effect" the SHPO "should" explain why under the National Register criteria. This section must be revised to obligate to the SHPO to provide such explanation in order to guard against the potential for arbitrary and capricious decisionmaking.

[7] As a corollary, the NPA should establish that providing the Submission Packet to an Indian tribe or NHO creates a non-rebuttable presumption of a reasonable effort to follow-up on an initial communication with that tribe or NHO.

This generally would permit applicants to file Submission Packets with a SHPO no sooner than 21 days after beginning the Section 106 process and, in all cases but those involving adverse effects, would generally permit conclusion of the Section 106 process within 61 days of initiation. These proposals will better ensure that the consultation process is not bogged down by unnecessary delay due to open-ended review periods, but will also afford all stakeholders with ample time to fulfill their Section 106 obligations.

B. Tower Construction and Registration By Non-Licensees Are Not Undertakings

The Commission has never directly confronted the question of whether a tower constructed by a non-licensee of the FCC, and which tower is not regulated under Part 17 of the Commission's rules, constitutes an "undertaking" for purposes of Section 106.[8] ATC believes that construction of such a tower is not an "undertaking" and that the Commission lacks jurisdiction to require non-licensee tower owners to comply with Section 106 prior to construction. ATC further believes that the Commission's ministerial act of registering an antenna structure under Part 17 of its rules does not amount to a federal approval and also is not an undertaking under the terms of Section106. The FCC must resolve these questions in the NPA and revise the NPA accordingly.

Section 301 of the NHPA defines an "undertaking" as:

> A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including –

[8] ATC notes that the Draft NPA does not even define the term "Undertaking" and urges the Commission to adopt a definition in addition to citing the definition in the NHPA and providing a list of representative actions.

(A) those carried out by or on behalf of the agency;

(B) those carried out with Federal financial assistance;

(C) those requiring a Federal permit[,] license, or approval; and

(D) those subject to State or local regulations administered pursuant to a delegation or approval by a Federal agency.

16 U.S.C. § 470w(7). When a non-licensee constructs a tower that does not require registration, there is simply no federally cognizable interaction between the FCC and the tower or tower builder. No action is carried out "by or on behalf of the agency"; it is not "carried out with Federal financial assistance"; it does not require "a Federal permit[,] license or approval"; and it is not "subject to State or local regulations administered pursuant to a delegation or approval by a Federal agency." Thus, on its face, construction of such a tower clearly does not fall within the NHPA's definition of "undertaking."

Likewise, tower registration itself is not an undertaking. Rather it is a non-discretionary, ministerial act. While Part 17 of the FCC's rules sets forth the criteria requiring FAA notification and tower registration, registration is automatic, and requires no exercise of FCC discretion or further oversight.

The Fourth Circuit has directly addressed such automatic ministerial acts in the context of both the NEPA and NHPA. In *Sugarloaf Citizen Ass'n v. FERC*,[9] the Fourth Circuit determined that because the Federal Energy Regulatory Commission ("FERC") did not have the authority to reject an application for certification of a small power production facility that met the requirements set forth in Public Utility Regulatory Act, FERC's

[9] 959 F.2d 508 (4th Cir. 1992).

certification action was ministerial in nature and not subject to NEPA.[10] The NHPA's requirements were also not found to apply because its triggers are similar to those in NEPA.[11]

When the Commission revised its antenna structure registration rules in 1995, it concluded that registration was an "undertaking" but its reasoning was unconvincing and unsupported. The Commission explained that "registering a structure constitutes a 'federal action' or 'federal undertaking,' such that the imposition of environmental responsibilities on the structure owner is justified. At the outset, the owner may be proposing to register and construct a structure at a location that significantly affects the quality of the human environment within the context of NEPA."[12] But the fact that a structure is constructed in an environmentally sensitive area is a completely separate question from whether that structure has a federal nexus sufficient to render it an undertaking. The mere fact that the registration occurs pursuant to a federal law is, by itself, insufficient to create such a nexus. Nevertheless, the Commission simply collapsed the two inquiries to arrive at a convenient, but legally incorrect conclusion. The Draft NPA should acknowledge that construction of towers – both unregistered and registered – is not an undertaking.

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[10] *Id.* at 513.

[11] *Id.* at 515.

[12] Report and Order, *Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures*, WT Docket No. 95-5, 11 FCC Rcd 4272, at ¶ 41 (1995). In reaching this conclusion, the Commission relied on the comments of GTE, which had argued that the registration process "though seemingly insignificant, rises to the level of 'federal action' . . ." because the FCC's then-current rules required compliance with NEPA and the NHPA and the registration would impose the responsibility for compliance with the FCC's rules "on a group of individuals (owners) who are

C. Adopt Clear and Objective Exclusions

The final NPA should clearly exempt from the Section 106 review process any class of undertakings that present little or no ability to cause adverse effects to historic properties. Exclusions are important and effective streamlining measures, as long as they are concise, objective and self-executing. If an exclusion cannot be articulated in this manner, it should not be included in the final programmatic agreement. ATC believes that the most important and easily implemented exclusions are those governing replacement towers and previously disturbed ground. In addition, although not technically an exclusion, ATC submits that the provision in Section VI.C.3. regarding archeological surveys is a very reasonable and helpful streamlining provision.

Regardless of the conclusion the Commission reaches with respect to what actions constitute an undertaking generally, it should affirm, as proposed in Section I.C. of the Draft NPA, that maintenance and servicing of towers and antennas "are not deemed to be Undertakings." Because these tower modifications, like maintenance and service, are not federally licensed or approved, they are clearly not undertakings and not appropriately characterized as such in the exclusion section. Thus, in conjunction with adding modifications to the stipulation in Section I.C., the Commission should also remove modifications from the list of excluded undertakings in Section III.A.1. Rather, this provision should be incorporated into Section I.B. "Applicability and Scope" in the final NPA.

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not required to comply at present, and the imposition of responsibility that accompanies the registration 'requir[es] such owners to take action pursuant to federal law.'" *Id.* at ¶ 38.

D. Adopt Reasonable Tribal Participation Procedures

Tribal consultation is a sensitive area for the Commission. ATC acknowledges that Indian tribes and Native Hawaiian organizations ("NHOs") always must be treated with the utmost respect to which they are entitled, particularly by the federal government, and also by state governments and private industry, in the Section 106 review process. In all cases, the tribes' right to government-to government consultation (the right to consult directly with the FCC itself) and the right to be a consulting party on request should be granted and clearly recognized in the NPA. In all other respects, however, the NPA should grant no greater rights to, or impose no greater burdens on, Indian tribes or NHOs than it does to other consulting parties. No such grant or imposition is required by Section 106(d)(6) of the NHPA. Bearing these general principles in mind, in Section IV.A., the FCC should establish that non-federal parties unquestionably are authorized to participate in and conclude this review process, while tribes have the right to demand consultation with the FCC itself on any matter at any time. Without this clarification, the actions of the FCC's non-federal delegatees in the Section 106 process could be challenged as unauthorized exercise of federal consultation authority.

ATC also submits that the FCC should reject the proposal proffered by USET (*see* Draft NPA Section IV, Alternative B) that would require the Commission to be involved directly in every undertaking unless an Indian tribe expressly waives its right to government-to-government consultation. ATC endorses the comments and legal reasoning asserted in this proceeding by PCIA regarding this proposal. ATC notes that the Commission has neither the resources nor the expertise to implement USET's proposal and could not acquire

such resources and expertise without unreasonably delaying deployment of telecommunications services across the nation.

E. Implement Fair and Uniform Complaint Procedures

In order for the benefits of the NPA to be fully realized, and as a matter of fundamental fairness to its regulatees, the FCC must set forth clear procedures for handling complaints relating to the Section 106 process and findings of adverse effect. These procedures must address the timeliness of complaints, the substantive burden of complainants and the issues that the Commission will review pursuant to such complaints. In ATC's experience, the Commission currently has no screening process for Section 106 complaints. Rather, it appears that all complaints generate an inquiry letter to the owner of the complained-against tower, forcing that party to expend valuable time, internal resources and money preparing a response to a complaint that should have been dismissed for failing to satisfy well-established Commission pleading rules.

At a minimum, the Commission must require that a complaint be filed within a reasonable time after the undertaking is completed. The complaint must be supported by substantial evidence, as the Commission requires for complaints filed pursuant to the NCPA,[13] with the initial burden of proof on the complainant, not on the structure owner. And, because Section 106 is a procedural statute that generally only applies at the pre-construction phase, post-construction complaints alleging violations of the Section 106 process should be dismissed unless they also allege that the undertaking has an adverse effect

[13] *See* NCPA at Section III.A.4; Section IV.A.4.

on an historic property. In the absence of these procedures, every constructed tower and every collocation will be forever subject to complaints under ever-changing standards.

II. Comments on Other Specific Provisions in the Draft NPA

In addition to the concerns expressed above, ATC suggests changes to a number of specific provisions of the Draft NPA. As indicated in the discussion below, ATC believes that those provisions must be revised, and reformed to confirm to the FCC's existing rules and the original intent of the NHPA in order for the NPA to work effectively.

A. Filing of Environmental Assessments ("EAs")

The Commission's current policy and practice is to require the submission of an EA only if an Undertaking is found to "adversely affect" Historic Properties. This policy is recognized in Section I.E. of the Draft NPA, which states that an Applicant satisfies its Section 106 obligation by completing the review process set forth in the Draft NPA "except for Undertakings that have been determined to have an adverse effect." In this case, an EA must then be submitted. This policy also confirmed in the 2002 Fact Sheet accompanying the NCPA, which explains that applicants only should file an EA when the collocation falls within one of the agreement's exceptions and "the collocation will adversely affect a historic property."[14] For purposes of consistency, the 7th line of the 4th Whereas clause in the Draft NPA should be revised to replace "may affect" with "adversely affects."

In addition, ATC proposes that the following footnote be added to Section I.E.: "A preliminary finding of adverse effect that has been changed to a conditional 'no adverse

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[14] NCPA Fact Sheet at 10 (Jan. 10, 2002).

effect' due to the imposition or agreement to the imposition of conditions that adequately mitigate or avoid the adverse effect, does not require the filing of an EA."[15] Clearly, if the parties have reached an agreement on how to mitigate potential effects, it would be an inefficient use of scarce Commission resources to require a lengthy review process, where significant environmental effects on historic preservation grounds have been avoided.

B. Allocating Responsibility Among Commission Regulatees

The current definition of "Applicant" in the Draft NPA fails to adequately identify which party shall bear Section 106 responsibilities in a number of common scenarios faced by ATC and the tenants on its tower. It is not evident from the Commission's rules or case law (or the Draft NPA or draft forms), whether the owner of a registered tower or an FCC licensee leasing space on the tower is responsible for Section 106 compliance when constructing a new tower. Nor is it clear which party bears responsibility for Section 106 compliance in cases where a collocation falls outside the exclusions of the NCPA and a "full" Section 106 is required. For example, if ATC substantially increases the height of a tower to permit an FCC licensee to collocate, it is not apparent which party is initiating the undertaking – if, in fact, it is an undertaking.[16] The Commission must clarify which party holds responsibility in such circumstances because the conclusion has significant ramifications for the owner-tenant relationship, FCC enforcement action and practical application in the field.

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[15] ATC suggests that the Commission revise Section VII.D. to clarify that no EA is required for findings of "no effect," "no adverse effect" and "conditional no adverse effect."

Should the Commission conclude that tower construction or registration is an undertaking, then ATC submits that the most logical approach to NHPA compliance is to centralize the responsibility for Section 106 compliance with the infrastructure owner, and not with any tenant.[17] Because compliance with Section 106 "runs" with the tower, the tower owner is in the best position to consistently and efficiently ensure that the requirements of Section 106 are satisfied for construction and for each collocation. The Commission therefore should prohibit non-owners from making filings with the Commission or SHPOs or Indian tribes implicating the owner's rower without express written consent of the owner. Adopting this policy in the NPA will avoid duplicative, confusing and unnecessary compliance efforts.

C. Assessment of Effects

ATC endorses PCIA's comments regarding the proper assessment of visual effects under Section 106. Visual effects that do not physically alter characteristics of National Register eligibility of a historic property are at most aesthetic effects, involving personal standards of beauty and appropriateness, but not cognizable under Section 106. In Section VI.E. concerning visual effects, the Draft NPA should make clear that mere visibility of an

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[16] These questions become substantially more complex if the Commission lacks jurisdiction to regulate tower construction because it is not an NHPA undertaking.

[17] The Draft NPA (as well as the NCPA) perpetuate a distinction between wireless and broadcast facilities and assign regulatory responsibility within the Commission based upon the distinction. In light of the fact that virtually every tower can accommodate a broadcast or wireless licensee, ATC is not clear what constitutes a wireless or broadcast facility – or why different rules would apply to one or the other.

Undertaking from a historic property, without alteration of a National Register-qualifying characteristic of that property, cannot constitute an effect or adverse effect.

Moreover, ATC supports PCIA's approach regarding the scope of eligible properties to be considered for purposes of Section 106 review. Specifically, the Commission should clarify that Section 106 review applies only to those properties listed in or determined eligible for the National Register by the Keeper of the National Register.[18] Such an approach is consistent with the original intent of Congress in adopting (and amending) the NHPA, and is also consistent with the Department of Interior's rules.[19] Therefore, consideration of properties that have not been determined eligible by the Keeper of the National Register is beyond the scope of the NHPA and the programmatic agreement.

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[18] *See* 36 C.F.R. § 60.3(c) defining "determination of eligibility" as "a decision by the Department of Interior that a district, site, building, structure or object meets the National Register criteria for evaluation although the property is not formally listed in the National Register; 36 C.F.R. § 60.3(f) defining "Keeper of the National Register" as "the individual who has been delegated the authority by the NPS to list properties and determine their eligibility for the National Register; 36 C.F.R. § 60.9 (requiring federal agencies to establish programs "to locate, inventory, and *nominate to the Secretary* all properties under the agency's ownership or control that appear to qualify for inclusion on the National Register) (emphasis supplied); *see also* 36 C.F.R. § 60.3(h) (defining National Park Service as bureau of DOI to which the Secretary of Interior has delegated the authority and responsibility for administering the Nation Register program); 36 C.F.R. § 63.2 (setting forth process for how a federal agency can request a formal determination of eligibility from the Department of Interior); 36 C.F.R. § 63.3 (stating that even when the federal agency and SHPO agree on the eligibility of a property, the Keeper may inform them that the property has not been "accurately defined and evaluated" therefore they may only consider the property "eligible" for purposes of obtaining comments from the Advisory Council).

[19] In adding the "eligible for inclusion" language to the NHPA in 1976, Congress made clear that the language was a "housekeeping amendment" and covered only properties "determined to be eligible for inclusion in the National Register." *See* S. Rep. No. 94-367, at 13 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2442, 2450. Furthermore, the NPS' rules explain that "[t]he National Register is an *authoritative* guide to be used by Federal, State, and local governments, private groups and citizens to identify the Nation's cultural resources and *to indicate what properties should be considered for protection from destruction or impairment*." 36 C.F.R. § 60.2 (emphasis supplied).

D. Draft Form NT and Draft Form CO

ATC fully supports the Commission's attempt to develop simple, universal, standardized forms in order to minimize repetitive filings with SHPOs and disputes over sufficiency of an applicant's assessment of effects. However, ATC believes that both of the draft forms are extremely confusing and unduly burdensome. ATC endorses the changes to these forms submitted in the comments prepared by PCIA.

Conclusion

ATC submits these comments with the sincere belief that the current Draft NPA offers substantial potential streamlining benefits to both regulators and the regulated industry, for both communications and broadcast towers. These comments highlight areas that can improve the Draft NPA in practical application.

ATC offers both these comments and its further assistance to the Commission in finalizing and implementing an NPA that will help reduce unnecessary compliance burdens on all parties, while at the same time fully meeting the preservation goals of Section 106.

Respectfully submitted,

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Thus, under the Secretary's rules, the National Register presents the universe of those properties to be protected under the preservation laws.